

## Message Text

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ACTION EB-08

INFO OCT-01 ARA-10 ISO-00 L-03 CAB-02 CIAE-00 COME-00  
DODE-00 DOTE-00 INR-10 NSAE-00 PA-01 ICA-11 /046 W  
-----009458 291046Z /10

R 271615Z MAY 78  
FM AMEMBASSY BRASILIA  
TO SECSTATE WASHDC 7690  
INFO AMCONSUL RIO DE JANEIRO  
AMCONSUL SAO PAULO  
FAA ATLANTA GEORGIA  
FAA WASHINGTON DC

LIMITED OFFICIAL USE SECTION 1 OF 3 BRASILIA 4237

FOR LEGAL ADVISOR, ARA/ECA, EB/AV

EO 11652: N/A  
TAGS: EAIR, BR  
SUBJ: BRAZILIAN VIEW ON AIRWORTHINESS CERTIFICATION OF BANDEIRANTE -  
REQUEST FOR LEGAL OPINION

REF: A. BRASILIA 4022, B. STATE 115392, C. BRASILIA 2730  
D. RIO DE JANEIRO 1650, E. STATE 60186, F. BRASILIA 2111,  
G. BRASILIA (77) 9971, H. BRASILIA (77) 0907

1. BEGIN SUMMARY. EMBRAER DIRECTOR-SUPERINTENDENT HAS RECENTLY  
REITERATED IN STRONG AND PERSISTENT TERMS CHARGE THAT, BY  
NOT CERTIFYING STRETCHED 10-PASSNGER BANDEIRANTE FOR SCHEDULED  
COMMUTER SERVICE UNDER FAR 23 (PLUS CONDITIONS), USG IS IN  
VIOLATION OF ITS INTERNATIONAL OBLIGATIONS. OFFICIAL ALLEGED  
THAT THIS VIEW NOT ONLY IS HIE BUT IS GENERALLY SHARED BY TOP-  
LEVEL AVIATION AUTHORITIES OF THE GOB. EMB OFFICER, EXPRESSING  
CONCERN THAT THIS VIEW SHOULD HAVE CURRENCY WITHIN GOB, STRONGLY  
DENIED THE CHARGE. EMBRAER OFFICIAL HAS NOW SOUGHT TO SUBSTANTIATE  
HIS CHARGES IN WRITING. EMBASSY REITERATES PREVIOUS REQUEST  
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THAT DEPARTMENT'S LEGAL ADVISER AND FAA LEGAL STAFF GIVE LEGAL  
OPINION ON GOB'S CHARGE THAT US IS IN VIOLATION OF BILATERAL  
AIRWORTHINESS AGREEMENT. END SUMMARY.

2. AT A DINNER FOR DEPARTING FAA REPRESENTATIVE, STATIONED IN  
RIO, COLONEL OZIREZ SILVA, DIRECTOR-SUPERINTENDENT OF EMBRAER,  
REPEATEDLY SOUGHT OUT ECON/COMM COUNSELOR TO DISCUSS BRAZILIAN

CONCERNS ABOUT THE USG POSITION ON CERTIFICATION OF BANDEIRANTE AIRCRAFT. OZIERES SAID THAT THE HISTORY OF THE CERTIFICATION ISSUE TOGETHER WITH THE GRANDFATHER CLAUSE OF THE BILATERAL AIRWORTHINESS AGREEMENT CLEARLY REQUIRED THE USG TO CERTIFY BANDEIRANTE AIRCRAFT FOR SCHEDULED COMMUTER SERVICE UNDER FAR 23 PLUS CONDITIONS. HE ADDED THE MORE LIMITED CERTIFICATION WHICH THE USG HELD OUT REALLY WAS OF VERY LITTLE VALUE BECAUSE THE MARKET POTENTIAL OF THE AIRPLANE WAS IN THE COMMUTER FIELD. OZIERES, WHO WITH SOME 300 UNSOLD PLANES AT SAO JOSE DOS CAMPOS, FACED MAJOR PROBLEMS, REPEATEDLY AND PERSISTENTLY REITERATED CHARGE THAT USG WAS IN VIOLATION OF AN INTERNATIONAL AGREEMENT AND THAT FAA'S APPROACH NOT ONLY WAS ILLEGAL BUT HIGHLY INEQUITABLE SINCE US AND FOREIGN (CANADIAN) AIRCRAFT NOT MEETING FAR 25 STANDARDS CONTINUE TO BE MANUFACTURED AND COMMISSIONED FOR SCHEDULED COMMUTER OPERATIONS. FAA'S APPROACH, THEREFORE, DID NOT ENHANCE US PASSENGER SAFETY BUT SIMPLY PROTECTED EXISTING MANUFACTURERS AGAINST THE COMPETITION OF NEWCOMERS LIKE EMBRAER. OZIERES ALLEGED THAT THE VIEWS HE PRESENTED WERE FULLY SHARED BY SENIOR AVIATION AUTHORITIES, AND THAT THE AIR MINISTER WAS DEEPLY OFFENDED BY UNWILLINGNESS OF USG TO LIVE UP TO ITS INTERNATIONAL COMMITMENTS.

3. ECON/COMM COUNSELOR STRONGLY DENIED OZIERES' CHARGE, EXPRESSING HIS CONCERN THAT THIS VIEW SHOULD HAVE GAINED ACCEPTANCE WITHIN GOB. OZIERES HAS NOW SOUGHT TO SUBSTANTIATE HIS VIEWS IN WRITING.  
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FOLLOWING IS TEXT OF HIS PRESENTATION.

4. HISTORICAL BACKGROUND  
A) ON NOVEMBER 12, 1968 PROCEEDINGS WERE FILED WITH THE CTA (AERONAUTICAL TECHNOLOGICAL CENTER) FOR THE CERTIFICATION OF THE EMB-110 BANDEIRANTE; BRAZILIAN CERTIFICATION AUTHORITIES DECIDED THAT THE APPLICABLE REGULATION WAS FAR-23, THROUGH AMENDMENT 7. AT THE TIME, THIS REGULATION WAS THE ONE IN FORCE FOR OTHER US AND THIRD COUNTRY AIRPLANES, SUCH AS:

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FOR LEGAL ADVISOR, ARA/ECA, EB/AV

- SHORT'S SKYVAN SC-7: ON JUNE 7, 1968 THE FAA APPROVED  
THE REQUEST FOR CERTIFICATION OF THIS BRITISH PLANE UNDER  
FAR -23, SUBJECT TO CERTAIN SPECIAL CONDITIONS;  
- THE HAVILLAND TWIN-OTTER: ON MARCH 8, 1969, MODEL 300 OF  
THE CANADIAN PLANE WAS APPROVED UNDER FAR-23, ALSO SUBJECT  
TO CERTAIN SPECIAL CONDITIONS:  
- HANDLEY PAGE JETSTREAM HP 137: ITS CERTIFICATION WAS APPROVED  
ON AUGUST 25, 1969, UNDER FAR-23 THROUGH AMENDMENT 3;  
- SWERINGEN METRO II ON JUNE 1970, CERTIFICATION OF THIS US-MADE  
PLANE WAS APPROVED UNDER FAR-23, SUBJECT TO CERTAIN SPECIAL  
CONDITIONS;  
-BEECHCRAFT A-99A: ON FEBRUARY, 1971, CERTIFICATION PROCEEDINGS  
WERE INITIATED UNDER FAR-23 THROUGH AMENDMENT 3; LIKEWISE,  
FOR THE BEECHCRAFT B-99, THE FAA REQUESTED IDENTICAL RULING IN  
MARCH 1972,  
B) IN MARCH 1971, EMBRAER REQUESTED INFORMATION FROM THE FA  
REPRESENTATIVE IN RIO DE JANEIRO ON APPROVAL PROCEDURES FOR  
US CERTIFICATION. A LETTER DATED JUNE 2, 1971 INFORMED EMBRAER THAT  
NOTHING COULD BE DONE WITHOUT THE SIGNING OF A BILATERAL  
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MUTUAL CERTIFICATION AGREEMENT BETWEEN BRAZIL AND THE US. THERE-  
AFTER, THE NEW CTA STRUCTURE, IT WAS POSSIBLE, THROUGH THE EXECUTION  
OF A LARGE-SCOPE TECHNICAL EFFORT, TO ACCOMPLISH THE SIGNING  
OF THE AGREEMENT REFERRED TO ON JUNE 16, 1976;  
C) ON MARCH 13, 1971, FAA AMENDMENT 23-10 BECAME EFFECTIVE,  
LIMITING APPLICABILITY OF FAR 23 TO AIRCRAFT OF 12,500 LBS  
OR LESS MAXIMUM TAKEOFF WEIGHT AND DESIGNED FOR 9  
PASSENGERS OR LESS, EXCLUDING THE PILOTS. BANDEIRANTE'S WEIGHT  
IS 12,500 LBS., FALLING, THEREFORE, UNDER THE AMENDMENT;  
D) ON MARCH 27, 1976 EMBRAER REQUESTED, THROUGH CTA, FAA  
CERTIFICATION OF THE EMB110K1 BANDEIRANTE-CRUZEIRO (CARGO VERSION)  
BEFORE THE AGREEMENT WAS SIGNED. IN AUGUST 1976, FAA FORMALLY

ACCEPTED THE APPLICATION FOR CERTIFICATION, UNDER FAR-23 THROUGH AMENDMENT 7, SUBJECT TO ADDITIONAL SPECIAL CONDITIONS. ITS MUST BE NOTED THAT THIS APPLICATION INVOLVED ONLY THE EMB-110K1, SINCE THIS PLANE WAS AT THE TIME THE OBJECT OF INTEREST BY "FEDERAL EXPRESS" AND, ACCORDING TO FAA POLICY CERTIFICATION, APPLICATIONS MAY ONLY BE FILED WITH THE USG WHEN THERE IS A POTENTIAL US PURCHASER. CERTIFICATION PROCEDURES DID NOT GO FORWARD BECAUSE FEDERAL EXPRESS BACKED OUT;  
E) IN MARCH QOUUN EMBRAER, HAVING SECURED OTHER US PURCHASERS, REQUESTED CERTIFICATION OF EMB-110P2, A MORE MODERN VERSION FOR PASSENGER TRANSPORT;  
F) ON APRIL 22, 1977, FAA REPLIED, STATING THAT, IN VIEW OF AMENDMENT 23-10 IT COULD NOT CONCUR WITH EMBRAER'S REQUEST, SUBJECTING ITS (IEN FAA'S) ACCEPTANCE (OF THE PLANE) TO FAR-25, A STRICTER REGULATION APPLICABLE TO LARGE-SIZE PLANES, WHICH THE BANDEIRANTE CANNOT NOW MEET, DUE TO PROJECT DESIGN FEATURES.

5. THE BASIC PROBLEM

A) ITEM 9, LETTER H NO II OF THE BILATERAL AGREEMENT ESTABLISHES THAT THE LAWS AND REGULATIONS APPLICABLE TO LIMITED OFFICIAL USE

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PRODUCTS PRESENTLY IN PRODUCTION ARE THOSE "...REQUIREMENTS OF AIRWORTHINESS IN FORCE ON THE DATE OF THE LAST AMENDMENT TO THE REQUIREMENTS WHICH MAY BE REQUIRED FOR CERTIFICATION OF THE PRODUCT IN EXPORTING COUNTRY, OR THOSE REQUIREMENTS OF THE IMPORTING COUNTRY APPLICABLE TO A SIMILAR PRODUCT, CERTIFIED ACCORDING TO ITS OWN REQUIREMENTS ON THE SAME DATE";  
B) THE BANDEIRANTE BASIC MODEL HAD ITS CERTIFICATION PROCESS INITIATED WITH THE GOB AUTHORITIES IN 1968 (AS STATED IN ITEM 1.A) AND, THEREFORE,

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FOR LEGAL ADVISOR, ARA/ECA, EB/AV

ACCORDING TO THE BILATERAL AGREEMENT, THE REGULATIONS APPROVED BY THE GOB AT THE TIME SHOULD BE ACCEPTED BY THE USG. HOWEVER, THIS IS NOT THE INTERPRETATION OF THE FAA WHICH, AFTER LENGTHY DISCUSSIONS HELD SINCE 1976, DECIDED TO APPLY TO EMB-110P2:

- FAR 23 UP TO AMENDMENT 17, IN ADDITION TO SPECIAL CONDITIONS (RECENTLY, FAA AGREED TO ACCEPT UP TO AMENDMENT 7);
- OPERATIONS UNDER SECTION 91, WHICH AUTHORIZES ITS USE FOR CARGO, AIR TAXI AND EXECUTIVE TRANSPORT;
- OPERATIONS UNDER SECTION 135 (REGIONAL AIR TRANSPORT) LIMITED TO 9 PASSENGERS (CERTAINLY THIS WOULD BE UNECONOMIC FOR THE OPERATORS, THEREBY ELIMINATING THE MAJOR POTENTIAL MARKET FOR THE AIRCRAFT IN THE U.S.)

#### 6. POSSIBLE ARGUMENTATION

CONSIDERING THE PRECEDENTS ESTABLISHED IN OTHER BILATERAL AGREEMENTS, THE FAA SHOULD AGREE TO ACCEPT THE CERTIFICATION OF EMB-110P2 UNDER FAR 23 EXCLUDING AMENDMENT 23-10, PERMITTING ITS OPERATION UNDER SECTION 135 (REGIONAL AIR TRANSPORT).  
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THIS COULD BE ARGUED FOR IN THE FOLLOWING WAY:

- A) THE BILATERAL AGREEMENT ASSURES THE CERTIFICATION OF THE EMB-110 BASIC MODEL (APPLIED FOR WITH CTA ON NOVEMBER 12, 1968);
- B) THE EMB-110P2 MODEL, PRESENTLY IN PRODUCTION, EXCEEDS THE REQUIREMENTS ORIGINALLY ESTABLISHED FOR THE BASIC MODEL;
- C) IN THE US (AND CANADA, FOR THE TWIN OTTER MODEL), THERE ARE NOW IN PRODUCTION AND OPERATION AIRPLANES WHICH, SECURITY-WIDE, ARE INFERIOR TO THE PRESENT MODEL, EMB-110P2;
- D) THE FAA ANNOUNCED IN 1971, THROUGH THE PUBLICATION OF AMENDMENT 23-10, THAT FUTURE GENERATIONS OF SMALLER PLANES THAT WOULD BE TRANSPORTING 10 OR MORE PASSENGERS SHOULD MEET THE ACQUIREMENTS OF FAR-25, INDEPENDENTLY OF THE TYPE OF OPERATION, EITHER UNDER SECTION 135 OR SECTION 91. AT THE SAME TIME, MANY OBJECTIONS WERE RAISED REGARDING THE HIGHER COST OF CERTIFICATION OF SMALL PLANES UNDER FAR 25. IN AMENDMENT 23-10, THE FAA EXPLICITLY STATES: "IN ANY EVENT, THE RECENT RAPID INCREASE IN THE NUMBER OF SMALL AIRPLANES CARRYING 10 OR MORE PASSENGERS EMPHASIZED

THE NEED FOR A SINGLE LEVEL OF AIRWORTHINESS FOR AIRPLANES CARRYING 10 OR MORE PASSENGERS." YET, 7 YEARS LATER, NO REGULATIONS HAS BEEN PUBLISHED COVERING SUCH TYPE OF AIRCRAFT. IT WAS ONLY RECENTLY THAT THE IDEA OF A NEW FAR-24 APPEARED. THIS SITUATION PLACES THE BRAZILIAN MANUFACTURER, AND EVEN OTHER US MANUFACTURERS, IN A DISADVANTAGEOUS POSITION WITH REGARD TO AIRPLANES CURRENTLY IN PRODUCTION, WHICH WERE PREVIOUSLY CERTIFIED AND ARE NOW OBSOLETE IN THE LIGHT OF PRESENT REGULATIONS. IT IS OUR VIEWPOINT THAT THIS RESULT CONTRADICTS THE FAA OWN INTENTIONS, WHOSE OBJECTIVE HAS BEEN TO IMPROVE THE REQUIREMENTS ON BEHALF OF THE PUBLIC;

C) IF THE GOB WERE TO ADOPT A POLICY INDENTICAL TO THE ONE WHICH FAA IS ADOPTING VIS-A-VIS THE BANDEIRANTE, IT IS PROBABLE THAT NO US AIRCRAFT COULD ENTER THIS COUNTRY, IN VIEW OF WHAT IS ESTABLISHED IN THE BILATERAL AGREEMENT ITSELF. IN SHORT WHAT WE CAN SAY IS THAT WE HAVE AN AIRPLANE CERTIFIED LIMITED OFFICIAL USE

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ACCORDING TO GOB CONDISTIONS, WHICH ALSO APPLY TO US PLANES IN THE US.

IT WAS NOT POSSIBLE FOR US TO SECURE THE US-TYPE CERTIFICATE AT THE PROPER TIME, DUE TO THE NON-EXISTENCE OF THE BILATERAL AGREEMENT, AS SHOWN ON THE ATTACHED COPY OF FAA'S LETTER OF JUNE 2, 1971.

THIS BEING SO, WE UNDERSTAND THAT OUR AIRPLANE, IN SPITE OF ONLY HAVING ITS APPLICATION FOR CERTIFICATION FILED IN 1977, CANNOT BE ANALYZED UNDER PRESENT REQUIREMENTS, AS PROVIDED FOR IN THE BILATERAL AGREEMENT (END OF TEXT).

7. COMMENT:

EMBASSY NOTES THAT OZIRES IS VAGUE WHEN HE REFERS TO "MARCH 1971" AS THE DATE OF THE EMBRAER REQUEST FOR INFORMATION ON APPROVAL PROCEDURES FOR US CERTIFICATION. IT IS NOT CLEAR WHETHER THIS REQUEST WAS SUBMITTED BEFORE OR AFTER MARCH 13, 1971, THE EFFECTIVE DATE OF FAA AMENDMENT 23-10. THE EMBASSY ALSO NOTES THAT THE BRAZILIANS SEEM TO ASSUME THAT THE NINETEEN-PASSENGER STRETCHED BANDEIRANTE IS THE SAME KIND OF AIRCRAFT AS THE REGULAR SIZE MODEL.

8. AS THE DEPARTMENT IS AWARE, THE BANDEIRANTE QUESTION HAS BECOME A SOURCE OF GOB CONCERN AT THE MOST SENIOR LEVELS. THE EMBASSY REQUESTS THAT THE LEGAL ADVISOR REVIEW THE QUESTION OF LEGALITY OF THE US APPROACH TO BANDEIRANTE CERTIFICATION. JOHNSON

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